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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Guardianship of K.C., a Minor.	
R.A., Petitioner and Respondent, v. A.A., Objector and Appellant.	A134315 (Mendocino County Super. Ct. No. SCUK CVPG 11 25730)

Mother A.A. appeals from an order granting guardianship of her daughter, K.C., to her maternal aunt, R.A., in a proceeding brought under the Guardianship-Conservatorship Law provisions of the Probate code. Most of the issues Mother raises were forfeited because they were not first presented to the superior court. The remaining issues present no reversible error. Thus, we affirm.

BACKGROUND

Mother is a member of the Hopland Band of Pomo Indians (Hopland Tribe). She had a long history of substance abuse, domestic violence and demonstrated neglect that led to the removal of her two older children. Reunification efforts failed and, in 2008, the children were placed in a guardianship with R.A. Daughter K.C. was born in August of 2008.

After several referrals to the Mendocino County Child Protective Services (the Agency), mother was warned that she was in danger of having K.C. removed from her

without reunification services. For that reason, mother entered a voluntary agreement with the Hopland Tribe designating R.A. as K.C.'s Indian Custodian. K.C. has lived with her aunt and older siblings since she was six months old.

R.A. and K.C.'s maternal grandmother attempted to facilitate visitation between mother and the children over the years, but mother's drug use and other inappropriate behavior imposed significant challenges. During a supervised visit in March 2011 mother became hostile and violent, threatened grandmother with a knife, and refused to return K.C. to R.A. until the police intervened several hours later. Grandmother subsequently obtained a restraining order against mother.

On the Agency's advice, R.A. petitioned the probate court to be appointed K.C.'s guardian. Her petition was heard on April 5. Mother was given notice of the hearing by telephone and by personal delivery at her home, but did not attend. The court found good cause for a temporary guardianship and appointed psychologist Louis Bates to investigate. K.C.'s father, C.C., was incarcerated at the time. He did not participate in the guardianship proceedings and is not a party to this appeal.

Mother appeared at the next hearing on May 5 and said she had not been properly notified of the April 5 hearing. The court appointed counsel for her, and set a review of the temporary guardianship for May 17. On May 17th mother renewed her objection to the notice for the initial hearing and requested visitation. The court suggested that the parties hire a private visitation supervisor, since no agencies in the county provided such services without a fee in guardianship cases brought under the Probate Code. R.A. told the court that Lorraine Laiwa of the Indian Child Preservation Program in Ukiah was available to assist with visitation, and the court recommended that she be contacted.

At the next hearing, held on June 29, R.A.'s attorney told the court that Laiwa was willing and available to supervise visits, but only if mother submitted a clean drug test and provided written proof that she had been actively engaged in a drug counseling program for at least 30 days. Mother advised the court that she was attending A.A. meetings and working at a casino. The court agreed to refer the parties to Family Enhancement Services (FES), provided they understood that FES would have discretion

to possibly decline to provide supervision. If FES were to accept the case, the court ordered weekly visits.

In September the probate court referred the case to the Agency pursuant to Welfare & Institutions Code section 329.[1] Section 329 provides: "Whenever any person applies to the social worker to commence proceedings in the juvenile court, the application shall be in the form of an affidavit alleging that there was or is within the county, or residing therein, a child within the provisions of Section 300, and setting forth facts in support thereof. The social worker shall immediately investigate as he or she deems necessary to determine whether proceedings in the juvenile court should be commenced. If the social worker does not take action under Section 330 and does not file a petition in the juvenile court within three weeks after the application, he or she shall endorse upon the affidavit of the applicant his or her decision not to proceed further and his or her reasons therefor and shall immediately notify the applicant of the action taken or the decision rendered by him or her under this section."

Mendocino County social worker Edward Fox responded on behalf of the Agency. Mr. Fox declared that he had decided against initiating juvenile court proceedings on behalf of K.C., and that he was authorized to make that decision. An attached "delivered service log" described his research of the relevant case files and Agency records. He concluded that reunification services would not be offered due to mother's failure to reunify with her older children.

Dr. Bates submitted a 22-page guardianship report to the probate court. His investigation included reviewing files from the juvenile and probate court proceedings, police reports, and CLETS background checks on the involved adults. He also conducted home and office interviews with mother, the maternal grandmother, R.A., and K.C., and spoke with Laiwa, K.C.'s sibling D.A., and ICWA workers from the Hopland and Scotts Valley Tribes.

[1] Unless otherwise noted, all further statutory citations are to the Welfare and Institutions Code.

Dr. Bates reported that mother had a long history of violent relationships and substance abuse and had neglected her children. An incomplete psychological assessment suggested that she suffered from a personality disorder. Dr. Bates agreed with the assessment and noted mother's rigidity in thinking, high degree of blame and denial, narcissistic orientation, drug use, violence, lying, and manipulation. Mother was living with her disabled grandmother in Kelseyville and had no means to provide for a child. "In addition, [K.C.] doesn't really know [mother] since she's lived with [R.A.] most of her life and what [K.C.] does know of her mother is not good. [K.C.] talked to the undersigned about [mother] being 'mean' to family members and [K.C.] didn't want to be around her when [mother] is like that." Mother had refused to undergo drug testing or show she had participated in services. The Hopland Tribe believed she had not changed her pattern of intermittent drug abuse.

On the other hand, Dr. Bates reported that R.A. had adequate parenting skills, cared deeply about the three children, and seemed committed to their best interests. Her home was safe and secure and K.C. was strongly bonded to her aunt and siblings. Dr. Bates concluded it would be detrimental to place K.C. with mother. Instead, he recommended permanent guardianship with R.A. and strictly supervised visitation with mother until she provided long-term proof of a clean and sober lifestyle.

The hearing on the permanent guardianship lasted a full day. The court heard testimony from K.C.'s preschool teacher, the social worker assigned to D.A. and S.A.'s dependency case, Dr. Bates, Laiwa, R.A., and mother. Each of the witnesses, except for mother, gave testimony that was supportive of the proposed guardianship.

At the conclusion of the hearing the court found that returning K.C. to mother's custody would be detrimental to her physical safety and emotional well-being. The court further found that active efforts had been made to prevent the breakup of the Indian family. It explained: "As to both parents, there was a long multi-year history of involvement with CPS with [K.C.'s] siblings. And in the CPS cases, the reunification efforts were unsuccessful. [¶] After [mother's] reunification services had been termination [*sic*] from her oldest child . . . , she continued to engage in conduct that

resulted in CPS threatening to remove [K.C.] from her care. That resulted in voluntary placement with [R.A.] which has continued from 2009 until today. [¶] Since that time, [mother] has had the opportunity . . . to continue in services. I don't find compelling her uncorroborated testimony that she remains clean and sober. She has indicated that services were available to her [and] that she has attended such as Celebrate Recovery. [¶] She was offered visitation through Indian Child Welfare Office, through family members supervising and for a time through CPS. [Mother] was not able to successfully comply with beneficial visitation. She acted out. She missed visits. And I don't believe that any further services would have been appropriate given [mother's] lack of cooperation with them, simply would have been futile as evidenced by her rejection of Ms. Laiwa's most recent offer to supervise visits between herself and [K.C.] so long as she was in counseling and submitted drug tests, which she rejected."

The court found that K.C. required a guardian because her parents were unable to care for her, and that R.A. was the appropriate guardian. It also found that visits with mother would not be beneficial at that time: "[K.C.] has lived with [R.A.] most of her life, she's bonded to her as her primary caretaker. There's evidence that seeing her mother has been sporadic. When it has happened it's been upsetting for her and there are multiple occasions when her mother was not appropriate during the visits. And I'm referring specifically to the evidence about the November 2010 visit and the March 2011 visit that resulted in the supervisor having to get a restraining order against her daughter. So I'm not going to order visits at this time." The court advised mother to obtain a psychological evaluation, comply with any treatment recommendations made as a result, and provide proof of a substantial period of sobriety if she wanted to seek visitation in the future.

This appeal timely followed.

DISCUSSION

I. Most of the Claims Raised in This Appeal Were Forfeited

It is fundamental that a failure to object at trial generally waives the right to claim error as grounds for reversal on appeal. (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1379; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.) The purpose is to encourage parties to bring errors to the attention of the trial court, so that the trial court has an opportunity to correct them. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "At the risk of sounding like a broken record, we again cite the general rule: '[A] party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would " ' "permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." ' " (*In re Aaron B.*, *supra*, 46 Cal.App.4th at p. 846.)

The rule has particular importance in child custody matters. "[T]he appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.] Although an appellate court's discretion to consider forfeited claims extends to dependency cases [citations], the discretion must be exercised with special care in such matters. . . . Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance." (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.)

Application of the forfeiture doctrine precludes appellate consideration of most of mother's numerous arguments. Her primary claim is that the probate court was required to exercise its discretion under section 331[2] to seek juvenile court review of the Agency's decision not to commence a dependency proceeding. In support of this claim she argues

[2] Section 331 provides: "When any person has applied to the social worker, pursuant to Section 329, to commence juvenile court proceedings and the social worker fails to file a petition within three weeks after the application, the person may, within one month after making the application, apply to the juvenile court to review the decision of the social worker, and the court may either affirm the decision of the social worker or order him or her to commence juvenile court proceedings."

that Mr. Fox might not actually be a social worker, and therefore may not have been qualified to respond to the probate court's referral; that his investigation was inadequate; that the probate court should have served the referral on the Agency earlier than September; that K.C. was at risk of harm in R.A.'s care prior to the temporary guardianship; and that probate courts must seek juvenile court review of an agency's decision not to file a dependency petition in all cases that involve allegations of parental unfitness and/or which implicate the Indian Child Welfare Act (ICWA). Mother also maintains the court violated her due process rights when it declined to authorize visitation at the conclusion of the guardianship proceedings.

Mother raised none of these issues in the probate court, and we are not persuaded by her attempts to justify her failure to do so. She maintains that she was not required to ask the court to request that the juvenile court review the Agency's decision, because, as we understand her argument, the court was under a *mandatory* statutory duty to make such a request. She is mistaken. Section 331 plainly says that a person (here, the probate court judge) who applies to the social worker to initiate juvenile court proceedings "may" seek juvenile court review of an Agency's decision not to do so. The auxiliary verb "may" in the statutory language vests the trial court with discretion. Although Probate Code section 1513, subdivision (c) requires the probate court to refer a guardianship case to CPS for investigation when parental unfitness is alleged (see *Guardianship of Christian G.* (2011) 195 Cal.App.4th 581, 595–596), the probate court did just that in this case. While it declined to request juvenile court review of the outcome of that investigation, it was under no duty to do so.

Mother also argues she had no opportunity to object to the probate court's decision not to seek review of the Agency's rejection of dependency proceedings. Again, we disagree. Mother was present and represented by counsel at all times following the referral to the Agency and could have objected to the Agency's decision, or simply inquired about the status of the referral at any time. That she did not do so comes as no surprise, as she originally agreed to an informal guardianship with R.A. precisely so that the Agency would *not* file a dependency case.

Mother could also have objected to the court's visitation order, but did not. In any event, the evidence amply supports the court's view that visitation would not be in K.C.'s best interest unless and until mother could demonstrate that she had attained sobriety.

Mother raises a laundry list of other arguments, repackaged in various forms, against application of the forfeiture doctrine. These include that her attorney could not fairly have been expected to be aware of or anticipate the need to petition the juvenile court under section 331; that her case presents a primarily legal question; that it presents an issue of first impression, likely to recur and of continuing public interest; and that it would be more efficient to excuse her waiver than require her to claim ineffective assistance of counsel in a petition for a writ of habeas corpus. All of these points are meritless. Whether the probate court should have referred the case for juvenile court review (had the issue been preserved for appeal) would be heavily dependent on the specific facts of the case, and resolution of the claim on appeal would add nothing of discernable value to the law. In any event, there is no indication in the record that the result would have been different if mother's counsel had raised the contention in the probate court. This is not one of the rare cases (see *In re S.B., supra,* 32 Cal.4th at p. 1293) that warrant an exercise of appellate discretion to excuse a litigant's failure to raise his or her claim in the trial court.

II. The Record Supports the Active Efforts Finding

Mother contends the finding that active efforts were made to prevent the breakup of the Indian family is not supported by substantial evidence. (See 25 U.S.C. § 1901(1)(i); § 361.7, subd. (a); Cal. Rules of Court, rules 5.480, 5.484(c).) We disagree. The juvenile court removed K.C.'s older siblings and appointed R.A. their legal guardian after mother failed to complete court-ordered family reunification services that included parenting classes, drug treatment, drug testing, and therapy. The juvenile court found by clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, and that those efforts were unsuccessful.

Over the next two years, little changed. Gail Viera, mother's social worker, worked with mother on her domestic violence and drug use issues in order to keep K.C. "out of the system" and at home with mother. Viera encouraged mother to keep clean and sober, conducted random drug tests, tried to get her into therapy, and enlisted the Hopland Tribe's help with services and, once R.A. became K.C.'s Indian Custodian, with visitation. Although K.C. was not in the dependency system, Viera included her in mother's supervised visitation with her older siblings. Other visits were supervised by R.A., K.C.'s maternal grandmother, and the Hopland Tribe's ICWA worker. Mother was also offered visits supervised by Lorraine Laiwa, but she refused to comply with the precondition that she test clean for drugs.

This record, including but not limited to the efforts made in S.A. and D.A.'s cases, amply supports the finding that active efforts were made to prevent the breakup of this family. "[D]enial of services in an agency removal case is not inconsistent with the active efforts requirement if it is clear that past efforts have met with no success." (*Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 998; see also *Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1017.) That is the case here.

III. R.A.'s Apparent Failure to File General Instructions Does Not Warrant Reversal

Mendocino County Superior Court Local Rule 13.12 provides that "In all conservatorship and guardianship matters, no letters shall issue unless the conservator or guardian have executed and filed with the court General Instructions. The form of general instructions may be obtained from the clerk's office." Apparently no such general instructions were filed in this case, but the omission is not material. First, there is no indication that mother ever brought the omission to the probate court's attention, so the issue is not properly before us. Second, and independently, Mother has not even attempted to show that any harm resulted therefrom. None is apparent. (See Cal. Const., Art. VI, § 13.)

DISPOSITION

The order appointing R.A. as K.C.'s guardian is affirmed.

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Siggins, J.

We concur:

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McGuiness, P.J.

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Jenkins, J.